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IN THE
COURT OF APPEALS OF INDIANA

LLOYD E. HENDRICKS, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 01A02-0610-CR-844
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick A. Schurger, Judge
Cause No. 01C01-0605-FC-0011

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Lloyd E. Hendricks, Sr. ("Hendricks") appeals his six-year sentence with four years suspended to probation for sexual misconduct with a minor as a Class C felony for fondling his granddaughter's breast. Concluding that the trial court did not abuse its discretion in sentencing Hendricks and that Hendricks has not persuaded us that his sentence is inappropriate, we affirm the trial court.

Facts and Procedural History

On May 4, 2006, the State charged Hendricks with Sexual Misconduct with a Minor as a Class C felony[1] for fondling his granddaughter Y.H.'s breast in May 2005, when Hendricks was sixty-six years old and Y.H. was fifteen years old, with the intent to arouse either his or Y.H.'s sexual desires. Thereafter, Hendricks confessed to the crime and pled guilty as charged. In exchange for Hendricks' guilty plea, the State agreed to a "[c]ap of four (4) years on any initial executed sentence" with the trial court to determine the terms of Hendricks' sentence and probation.[2] Appellant's App. p. 35.

At the sentencing hearing, evidence was presented regarding the May 2005 incident. That is, when Hendricks and Y.H. were driving back from Ohio, Y.H. slid over next to Hendricks, and he put his arm around her. Hendricks then put his hand under Y.H.'s bra and fondled her breast. According to Hendricks, Y.H. "didn't object or move." *Id.* at 43. In an oral sentencing statement, the trial court identified as an

[1] Ind. Code § 35-42-4-9(b)(1).

[2] "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Ind. Code § 35-50-2-6.

aggravator that Hendricks violated a position of trust with his granddaughter.[3] As for mitigators, the court found that Hendricks expressed remorse in that he confessed to the crime and pled guilty and that he had no criminal history. The trial court did not accord Hendricks' expressions of remorse significant mitigating weight because it believed that Hendricks was downplaying his culpability for the crime by stating that Y.H. did not object or move when he fondled her breast. Concluding that the aggravator outweighed the mitigators, the trial court sentenced Hendricks to a term of six years with four years suspended to probation. The trial court remarked that but for Hendricks' lack of criminal history, it would have imposed an eight-year sentence. Hendricks now appeals.

Discussion and Decision

On appeal, Hendricks argues that the trial court abused its discretion in identifying the aggravators, in assigning insufficient weight to the mitigators it did find, and in failing to identify additional mitigators and that his sentence is inappropriate. In 2005, the Indiana General Assembly substantially amended our sentencing statutes in response to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005), *cert. denied*, 126 S. Ct. 545 (2005). In the most significant change, Indiana Code § 35-38-1-7.1(d) now provides that a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind.

[3] In its oral sentencing statement, the trial court discussed the impact of the crime on Y.H. Our reading of the record is that this discussion was part of the aggravator that Hendricks violated a position of trust with his granddaughter. To the extent that the trial court considered the impact of the crime on Y.H. as a separate aggravator, we agree with Hendricks that to do so was improper. We therefore find only one aggravator.

Code § 35-38-1-7.1(d) (2005). Our Supreme Court recently weighed in for the first time on the scope of appellate review of sentences under the amended statutes. *See Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *reh'g pending*. Because Hendricks' brief, the State's brief, and Hendricks' reply brief were all written before *Anglemyer*, we begin with a brief recap of the principles enunciated therein before turning to the contentions of the parties.

The *Anglemyer* Court first concluded that "under the new statutory regime Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense." *Id*. at 490. This statement "must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." *Id*. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id*.

On appeal, there are two ways to challenge one's sentence. First, a defendant could argue that the trial court abused its discretion in imposing the sentence. *Id*. "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id*. (citations omitted). A trial court can abuse its sentencing discretion in several ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that explains reasons for imposing a sentence where the record does not support the reasons; (3) entering a sentencing statement that omits reasons that are clearly supported by the record and advanced for

consideration; and (4) entering a sentencing statement in which the reasons given are improper as a matter of law. *Id*. at 490-91. If the trial court abuses its discretion in one of these or any other way, remand for resentencing may be the appropriate remedy "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id*. at 491.

The second possible recourse for a defendant appealing his sentence is Indiana Appellate Rule 7(B), which provides: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The *Anglemyer* Court explained:

> It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue.

Id. With this framework in mind, we turn to Hendricks' specific arguments.

Hendricks first argues that the trial court abused its discretion in identifying as an aggravator that he violated a position of trust with Y.H. *See* Appellant's Br. p. 17 ("The fact that Hendricks was [Y.H.'s] grandfather simply does not make his touching more egregious . . . ."). The trial court explained:

> As a grandfather, you were in a position where you had effectively at that moment in time the custody and control over the child . . . . You violated that position of trust. When you do something like that it[']s hard for me to fully express all the damage that you do.

Tr. p. 65 (capitalization omitted). Hendricks' trial attorney conceded as much. *See id.* at 59 ("Your Honor, he clearly violated [a] position of trust. I'm not going to sit here and at all try and convince you otherwise. He was [her] grandfather; he took her [with] him [on] a ride. That's clearly a classic violation of position of trust.").

Violation of a position of trust is a valid aggravating circumstance. *Plummer v. State*, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006); *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. Hendricks is Y.H.'s grandfather. According to Hendricks himself, Y.H. and her father were living with him at the time of the incident. *See* Appellant's Br. p. 17. Given this relationship, the trial court did not abuse its discretion in finding as an aggravator that Hendricks violated a position of trust with Y.H.

Hendricks next argues that the trial court failed to give sufficient mitigating weight to his expression of remorse, confession, guilty plea, and lack of criminal history. In *Anglemyer*, our Supreme Court concluded, "Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors." 868 N.E.2d at 491. Accordingly, Hendricks cannot argue on appeal that the trial court abused its discretion in failing to assign more weight to these mitigators.

Finally, Hendricks argues that the trial court "offered no rationale for rejecting [his] other proffered mitigating circumstances—that he is the kind of person likely to respond affirmatively to probation or short-term imprisonment and that given his age, imprisonment will result in undue hardship to him . . . ." Appellant's Br. p. 24. As for

the proffered mitigator that Hendricks is likely to respond affirmatively to probation or short-term imprisonment, we point out that it is not entirely clear whether the trial court did not find it to be a mitigator or whether the trial court found it to be a mitigator but did not accord it significant weight.[4] To the extent that the trial court found it to be a mitigator, Hendricks cannot challenge on appeal the weight the trial court gave it. In any event, the trial court sentenced Hendricks to a term of six years with four years suspended to probation, which left him with a two-year executed sentence. Thus, Hendricks in fact received short-term imprisonment with probation.

Regarding the mitigator that imprisonment will result in an undue hardship to Hendricks, the trial court explained that incarceration is always a hardship and that there was nothing "special about this case that makes it unusual as a hardship . . . ." Tr. p. 77 (capitalization). The Indiana Supreme Court has noted this mitigator can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *Espinoza v. State*, 859 N.E.2d 375, 387 (Ind. Ct. App. 2006) (citing *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002)). Hendricks makes no such showing here. Accordingly, the trial court did not abuse its discretion in failing to find it as a mitigator.[5]

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[4] The trial court stated:

> Now in terms of the mitigating circumstances, the two are alleged, one is you're likely to respond w[e]ll to short term imprisonment and the other is the sense of remorse in the confession and entering the plea of guilty avoiding the trial and so on. My job is to weigh those. . . .

Tr. p. 65 (capitalization omitted).

[5] Hendricks also suggests that the trial court was making a political statement about the inadequacy of Indiana's sexual offender registration statutes when it decided to suspend four years of his

We now turn to Hendricks' inappropriate sentence argument. As noted in *Anglemyer*, the defendant has the burden of persuading the appellate court that his or her sentence is inappropriate. 868 N.E.2d at 494. Hendricks has not met that burden.

As for the nature of the offense, Hendricks, a sixty-six-year-old man, fondled the breast of his fifteen-year-old granddaughter, a granddaughter who was apparently living with him at the time. According to Hendricks himself, he also kissed Y.H. with an open mouth. *See* Appellant's Br. p. 13, 15-16. Hendricks' abuse of this position of trust has destroyed the familial bond that once existed. Regarding Hendricks' character, it is true that he did not have a criminal history before this crime. And although Hendricks confessed to the crime and pled guilty, such expressions of remorse are tempered by Hendricks' explanation that Y.H. did not object or move when he fondled her breast. We are not persuaded that Hendricks' six-year sentence with four years suspended to probation is inappropriate.

Affirmed.

ROBB, J., and BRADFORD, J., concur.

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sentence to probation. However, we find that the trial court's main concern was that Hendricks be supervised upon his release from incarceration, which is justified under circumstances such as these where the victim is a family member.